

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RODERICK SAWYER,

Plaintiff,

vs.

MORROW COLE, *et. al.*

Defendants.

3:10-cv-00088-ECR (WGC)

REPORT & RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is Defendants' Partial 12(B) Motion to Dismiss for Failure to Exhaust Administrative Remedies. (Doc. # 39.)¹ Plaintiff opposed (Doc. # 45) and Defendants replied (Doc. # 46). Pursuant to the court's Order (Doc. # 47), Defendants supplemented their motion. (*See* Doc. # 50.) After a thorough review, the court recommends that Defendants' motion be granted.

I. BACKGROUND

At all relevant times, Plaintiff Roderick Sawyer (Plaintiff) was in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Sec. Am. Compl. (Doc. # 35) at 1.) The events giving rise to this action took place while Plaintiff was housed at High Desert State Prison (HDSP). (*Id.*) Plaintiff, a *pro se* prisoner, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Greg Cox, Jordana Evangelista, Genesa Garcia, Duane Graham, James Harpel, John Kotronakis, Cole Morrow,

¹ Refers to court's docket number.

1 and Clifton Smith. (*Id.* at 2-3.)

2 Plaintiff alleges that he was exposed to extremely unsanitary conditions in his cell during an
3 extended period of time from at least May 2009 through January 2010. (Doc. # 35 at 4.) Plaintiff
4 asserts that the unsanitary conditions stemmed, in part, from a toilet that would flush only once every
5 thirty (30) minutes. (*Id.* at 5, 13.) He claims that despite repeated requests, he was denied cleaning
6 supplies to use to clean his cell. (*Id.* at 4, 6, 9, 10, 11.) He alleges the unsanitary conditions resulted
7 in the growth of mold, bacteria, and fungus in his cell, which in turn caused him to develop a
8 respiratory illness. (*Id.* at 5.) The illness caused, among other things, vomiting, disorientation,
9 dizziness, shortness of breath and body aches. (*Id.* at 6-7.) Plaintiff also asserts that prison employees
10 served him food through an unsanitized food slot. (*Id.* at 9) Plaintiff claims that his dirty clothes and
11 a dirty plunger passed through the food slot prior to his food being served through the food slot. (*Id.*
12 at 9, 11, 13) Plaintiff also alleges that his cell was infested with bugs. (*Id.* at 9.) Additionally, Plaintiff
13 claims he was forced to endure freezing temperatures in his cell during the winter months because
14 Defendants would turn off the heat in his unit and would not provide him proper clothing to keep
15 warm. (*Id.* at 5, 10.) Finally, Plaintiff alleges he received inadequate medical care to treat the
16 prescribed ailments he suffered as a result of the conditions in his cell. (*Id.* at 7-8, 13, 14.)

17 On screening, the court found Plaintiff states a colorable claim under the Eighth Amendment
18 based on his allegations that he was subjected to unsanitary conditions and freezing temperatures, as
19 well as a claim under the Eighth Amendment based on inadequate medical care. (Doc. # 37 at 4-5.)

20 Defendants now move to partially dismiss Plaintiff's Second Amended Complaint on the
21 ground that Plaintiff failed to properly exhaust available administrative remedies with respect to
22 the following allegations: (1) inadequate medical care; (2) infestation of bugs in his cell;
23 (3) inability to flush the toilet more often than once every thirty (30) minutes; (4) freezing cell; and
24 (5) unsanitary receipt of food through the food slot. (Doc. # 37 at 4-7.) Defendants do not dispute
25 that Plaintiff properly exhausted his administrative remedies with respect to his claim that he was
26 denied cleaning supplies to clean the alleged mold, fungus, and bacteria from his cell. (Doc. # 39 at
27 4.)
28

1 Plaintiff, on the other hand, argues that he did properly exhaust his inadequate medical care
 2 claim and his claim that he was unable to flush the toilet more than once every thirty (30) minutes.²
 3 (Doc. # 45 at 4.) Plaintiff concedes that he failed to properly exhaust his administrative remedies as
 4 to the alleged infestation of bugs in his cell, the freezing cell, and the alleged unsanitary receipt of
 5 food. (Doc. # 45 at 4.)

6 **II. LEGAL STANDARD**

7 The PLRA provides that “[n]o action shall be brought with respect to prison conditions under
 8 section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other
 9 correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. §
 10 1997e(a). An inmate must exhaust his administrative remedies irrespective of the forms of relief
 11 sought and offered through administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001). The
 12 Supreme Court recently clarified that exhaustion cannot be satisfied by filing an untimely or otherwise
 13 procedurally infirm grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*,
 14 548 U.S. 81, 89 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and doing
 15 so *properly* (so that the agency addresses the issues on the merits).” *Id.* (quoting *Pozo v. McCaughtry*,
 16 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

17 The failure to exhaust administrative remedies is treated as a matter in abatement and is
 18 properly raised in an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th
 19 Cir.2003). Failure to exhaust administrative remedies is an affirmative defense that Defendants bear
 20 the burden of raising and proving. *Id.* A court, in deciding a motion to dismiss based on exhaustion,
 21 may look beyond the pleadings and decide disputed issues of fact without converting the motion into
 22 one for summary judgment. *Id.* (citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837
 23 F.2d 365, 368 (9th Cir. 1988) (per curiam)). If a court concludes that the prisoner bringing a suit has
 24 failed to exhaust nonjudicial remedies, “the proper remedy is dismissal of the claim without
 25 prejudice.” *Id.* at 1120.

26
 27 ² Plaintiff also takes issue with the fact that Defendants did not submit authenticated copies of
 28 his actual grievances. (Doc. # 45 at 3.) This argument is moot in light of Defendants’ filing their
 supplement which contains authenticated copies of the relevant grievance documentation. (Doc. # 50.)

1 For prisoners within the NDOC system, exhaustion of administrative remedies requires
2 compliance with the inmate grievance procedure set forth in NDOC Administrative Regulation (AR)
3 740. (Doc. # 39 at 3, Doc. # 39-1 (Ex. A).) The administrative process consists of submitting to
4 prison staff: (1) an informal level grievance; (2) a first level grievance appealing the informal
5 grievance decision; and (3) a second level grievance appealing the first level grievance decision. (Doc.
6 # 39 at 3, Doc. # 39-1 (Ex. A) at 14.)

7 An inmate who is dissatisfied with the response to a grievance at any level may appeal the
8 grievance to the next level. (Doc. # 39-1 (Ex. A) at 15.) All documentation and factual allegations
9 available to the inmate must be submitted at the informal level. (*Id.* at 18.) If the inmate disagrees with
10 the informal level response, the inmate shall appeal using a first level grievance form providing a
11 signed, sworn declaration setting forth the specific facts that form the basis for the claim that the
12 informal response is not correct. (*Id.* at 20.) In the event the inmate disagrees with the response to the
13 first level grievance, the inmate is instructed to file a second level grievance providing any additional
14 relevant documentation not already maintained in the inmate's first level grievance form. (*Id.* at 21.)

15 III. DISCUSSION

16 Plaintiff concedes that he failed to exhaust his administrative remedies with respect to the
17 following allegations: (1) infestation of bugs in his cell; (2) freezing cell; and (3) unsanitary receipt
18 of food. (Doc. # 45 at 4.) Therefore, Defendants' motion should be granted with respect to these
19 claims.

20 The court must now analyze whether Plaintiff properly exhausted his administrative remedies
21 with respect to his inadequate medical care claim and his claim that he was unable to flush the toilet
22 more than once every thirty (30) minutes. (*See id.*) Again, Defendants do not dispute that Plaintiff
23 properly exhausted with respect to his claim that he was denied cleaning supplies to clean the alleged
24 mold, fungus, and bacteria from his cell. (Doc. # 39 at 4.)

25 Before reaching that analysis, the court points out the continuing problem with defense counsel
26 merely filing the NOTIS report in place of the actual relevant grievance documentation to support an
27 unenumerated motion to dismiss for failure to exhaust administrative remedies. In this case,
28 Defendants concede that there was a disparity between the NOTIS report and the actual grievance

1 documentation. (*See* Doc. # 46 at 3 n. 1.) This is precisely the issue that the court has raised with
2 defense counsel in various other cases. In the future, the court urges defense counsel to file both the
3 authenticated NOTIS report and the relevant grievance documentation in support of an unenumerated
4 motion to dismiss for failure to exhaust administrative remedies.

5 **A. INADEQUATE MEDICAL CARE**

6 Plaintiff alleges that he was not thoroughly examined by an NDOC medical professional when
7 he sought treatment for an illness in June 2009. (Doc. # 35 at 7-8, 14.) He also asserts that he was
8 prescribed incorrect medication and that his requests for follow-up medical care were ignored. (*Id.*)

9 Defendants argue that the only grievance mentioning medical care, informal level grievance
10 2006-28-74791, merely describes Plaintiff's medical condition, but does not complain that the
11 treatment he was receiving was inadequate. (Doc. # 39 at 5.)

12 Plaintiff argues that he described his medical condition as a result of his unhealthy living
13 conditions, and stated that he was denied adequate medical treatment. (Doc. # 45 at 4.)

14 In his informal level grievance (grievance number 2006-28-74791), Plaintiff stated that he felt
15 sick and vomited when he was in his unsanitary cell. (Doc. # 50-1 at 6-7.) He also stated that he told
16 the doctor that he had been vomiting up his meals due to his unhealthy living conditions. (*Id.* at 7.)

17 In the first level of grievance, Plaintiff stated that his unhealthy living conditions made him
18 vomit up his meals. (Doc. # 50-1 at 9.) He also indicated that he had seen a doctor regarding this
19 matter and was told that the doctor could not do anything for him, and he would have to take the issue
20 up with the unit officers. (*Id.*)

21 In the second level grievance, Plaintiff stated that the "lack of HDSP staff has been inadequate
22 to professional health care" and has failed to provide sanitized living conditions. (Doc. # 50-1 at 14.)
23 He also stated that he was denied adequate medical treatment, after visiting the doctor about this
24 situation. (*Id.*)

25 To "properly" exhaust, Plaintiff is required to use all steps the agency holds out and do so
26 properly. *See Woodford*, 548 U.S. at 89 (citation omitted). Here, the issue is whether Plaintiff's
27 mention of his medical issues in the informal and first level grievance put Defendants on notice of a
28 claim for denial of adequate medical care. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

1 “[A] prison’s own grievance process, not the PLRA, determines how detailed a grievance must be to
 2 satisfy the PLRA exhaustion requirement.” *Id.* (citing *Jones v. Bock*, 549 U.S. 199, 218 (2007)). If
 3 a “prison’s grievance procedures are silent or incomplete as to factual specificity, ‘a grievance suffices
 4 if it alerts the prison to the nature of the wrong for which redress is sought.’” *Id.* (citing *Strong v.*
 5 *David*, 297 F.3d 646, 650 (7th Cir. 2002)). Therefore, “[a] grievance need not include legal
 6 terminology or legal theories unless they are in some way needed to provide notice of the harm being
 7 grieved. A grievance also need not contain every fact necessary to prove each element of an eventual
 8 legal claim.” *Id.* “The primary purpose of a grievance is to alert the prison to a problem and facilitate
 9 its resolution, not to lay groundwork for litigation.” *Id.* (citation omitted). The grievance should
 10 “provide enough information...to allow prison officials to take appropriate responsive measures.” *Id.*
 11 at 1121 (internal quotation marks and citation omitted).

12 Under AR 740, an inmate is required to provide *all available factual allegations* in the
 13 informal level grievance. (Doc. # 39-1 at 18.) Similarly, the first level grievance must set forth the
 14 *specific facts* that form the basis for the claim that the informal response is not correct. (*Id.* at 20.)
 15 While AR 740 provides a generic instruction to provide all available, specific facts in the informal and
 16 first level grievances, it does not expound on what factual specificity is required to properly exhaust
 17 administrative remedies.

18 The court finds that under AR 740 and *Griffin*, Plaintiff did not provide factual allegations in
 19 the informal and first level grievances that were specific enough to put Defendants on notice that he
 20 was claiming a denial of adequate medical care. Defendants are correct that what Plaintiff complained
 21 of was his medical condition, *i.e.*, that he was vomiting up his meals as a result of his alleged
 22 unsanitary living conditions. (*See* Doc. # 50-1 at 9-12.) Plaintiff did not provide specific details
 23 regarding the denial or delay of medical treatment so that Defendants could have taken appropriate
 24 measures upon receipt of the informal and first level grievances. Accordingly, Defendants’ motion
 25 should be granted as to Plaintiff’s inadequate medical care claim.

26 **B. TOILET FLUSHING**

27 Plaintiff alleges that his Eighth Amendment rights have been violated related to his conditions
 28 of confinement, in part because his toilet would not flush more than once every thirty (30) minutes.

1 (Doc. # 35 at 5-7, 13.)

2 Defendants concede that Plaintiff raised this issue in his informal level grievance (grievance
3 number 2006-28-74791), but argue that he abandoned his grievance as to the toilet issue because it was
4 not raised in his first or second level grievances. (Doc. # 39 at 6.)

5 Plaintiff concedes that he did not include the allegation of the toilet flushing past the informal
6 level grievance, but argues that this does not mean he abandoned this issue. (Doc. # 45 at 5.) Plaintiff
7 appears to argue that the first and second level grievances automatically relate to the issues raised in
8 the informal level grievance. (*Id.* at 5-6.)

9 At the informal level, Plaintiff stated that his toilet did not flush more than once every thirty
10 (30) minutes. (Doc. # 50-1 at 7.)

11 In the first level grievance, Plaintiff discussed the unhealthy conditions he was forced to live
12 in, but did not specifically mention the toilet issue. (Doc. # 50-1 at 8-9.) Likewise, Plaintiff makes no
13 mention of the toilet issue in the second level grievance. (*See* Doc. # 50-1 at 14-15.)

14 As stated above, “proper exhaustion” requires “using all steps the agency holds out, and doing
15 so *properly* (so that the agency addresses the issues on the merits).” *Woodford*, 548 U.S. at 89 (citation
16 omitted) (emphasis in original). Pursuant to AR 740, a first level grievance was required to set forth
17 the *specific facts* that form the basis for the claim that the informal response is not correct. (Doc. # 39-
18 1 at 20.) Plaintiff made no mention of the toilet issue in his first level grievance. Accordingly, the
19 court finds that Plaintiff has failed to properly exhaust his administrative remedies pursuant to AR 740
20 with respect to his claim that the toilet would not flush once more than every thirty (30) minutes. (*Id.*)
21 Defendants’ motion should be granted as to this claim.

22 Therefore, Plaintiff’s only remaining claim is that he was denied cleaning supplies to clean the
23 alleged mold, fungus, and bacteria from his cell.

24 **IV. RECOMMENDATION**

25 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order **GRANTING**
26 Defendants’ Partial Motion to Dismiss. (Doc. # 39.) Therefore, the following claims should be
27 **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available administrative remedies: (1)
28 infestation of bugs in his cell; (2) freezing cell; (3) unsanitary receipt of food; (4) inadequate medical

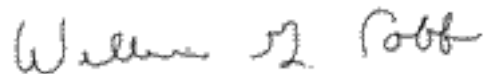
1 care; and (5) toilet flushing not more than once every thirty (30) minutes.

2 The parties should be aware of the following:

3 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local
4 Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14)
5 days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and
6 Recommendation" and should be accompanied by points and authorities for consideration by the
7 District Court.

8 2. That this Report and Recommendation is not an appealable order and that any notice
9 of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District
10 Court's judgment.

11
12 DATED: January 18, 2012.

13
14 

15 WILLIAM G. COBB
16 UNITED STATES MAGISTRATE JUDGE
17
18
19
20
21
22
23
24
25
26
27
28